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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 177.

JAMES COFFEY, PLAINTIFF IN ERROR,

vs.

THE COUNTY OF HARLAN.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA.

FILED JANUARY 3, 1906.

(20,034.)

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 27, 1906.

1 Pleas Before the Honorable William H. Munger, Judge of the District Court of the United States for the District of Nebraska, sitting in the Circuit Court of the United States for the District of Nebraska, within the Eighth Judicial Circuit, at the November, 1905, Term Thereof.

Be it remembered, That on the 18th day of May, 1905, amended petition was filed in the Clerk's office of the said Circuit Court, which said Amended Petition is in words and figures following, to-wit:—

In the Circuit Court of the United States in and for the District of Nebraska.

JAMES COFFEY, Plaintiff,
vs.
THE COUNTY OF HARLAN, IN THE STATE OF NEBRASKA, Defendant.

Action at Law.

Amended Petition.

I.

Plaintiff states that he is a citizen of the state of Kansas, and that the defendant is one of the duly organized and existing counties of the State of Nebraska, and a citizen of the state of Nebraska, and that the matter in dispute in this suit exceeds the sum or value of Two Thousand Dollars ($2,000.00) exclusive of interest and costs.

For a first cause of action the plaintiff states: he has a legal estate in, and is entitled to the immediate possession of the following
2 described real property, situated in said county of Harlan and State of Nebraska, to-wit: The East half (½) of the Southeast quarter (¼) of Section one (1) and Lots Two (2) and Three (3) of Section Twelve (12), all in Township One (1) North of Range seventeen (17) West of the sixth (6th) Principal Meridian, and said defendant unlawfully keeps him out of the possession thereof.

That plaintiff and defendant claim said premises from a common source of title, to-wit: One Ezra S. Whitney. That plaintiff claims title through a deed of the said Ezra S. Whitney and wife conveying said premises, made and executed November 29, 1898, and filed for record in the office of the Register of Deeds of Harlan County, Nebraska, November 30, 1898; and the defendant claims the legal title and ownership of said premises by virtue of a sheriff's deed thereto, dated February 13, 1899, which deed was duly filed for record in the office of the Register of Deeds of Harlan County, Nebraska, on February 14, 1899; that said sheriff's deed under which defendant claims, is based upon an execution sale made by the sheriff of Harlan County, Nebraska, on the 12th day of April, 1898, which execution was issued upon a certain judgment rendered by the District Court of Harlan

County, Nebraska, on the 15th day of May, 1897, in a certain criminal prosecution in which the state of Nebraska was plaintiff and Ezra S. Whitney defendant, in which criminal proceeding the said Ezra S. Whitney was charged with and tried for the crime of embezzlement and which trial resulted in a verdict of guilty; and said verdict set out the amount by him Ezra S. Whitney embezzled; and thereupon the said Ezra S. Whitney was sentenced to imprisonment in the State Penitentiary for a term of years and a judgment was rendered against the said Ezra S. Whitney in favor and for the benefit of Harlan County, defendant herein, in double the amount
3 so found by the jury to have been embezzled by him the said Ezra S. Whitney. That no pleading of a civil nature was filed in said cause nor was there any issue, charge or claim in said cause of any civil liability against said defendant, Ezra S. Whitney, nor was the said Ezra S. Whitney indebted to said Harlan County, nor was said Ezra S. Whitney given any opportunity whatever in said criminal suit to defend against his said civil liability, the only issue in said suit being the guilt or innocence of said Ezra S. Whitney.

That said judgment was entered under section 124 of the Code of Criminal Procedure of the State of Nebraska; that said judgment and the provisions of said section 124 providing for the rendition of said judgment, are, under the Constitution of the United States utterly void and of no force and effect; and the same is an attempt to take the property of the said Ezra S. Whitney and plaintiff as his grantee and deprive plaintiff thereof without due process of law. And the right claimed by this plaintiff in this suit and proceeding involves the right construction of the Constitution of the United States and more particularly that clause thereof which provides that no person shall be deprived of his property without due process of law.

II.

That as a second cause of action the said plaintiff states that said defendant while unlawfully keeping said plaintiff out of possession as aforesaid, has ever since the first day of December, 1899, excluded plaintiff from the rents, issues and profits of said premises, and refuses to account or pay to said plaintiff any part or value thereof. That the value of the rents, issues and profits from said date and the damages for withholding said premises from said plaintiff,
4 amount to Fifteen Hundred Dollars ($1,500.00) no part of which has been paid.

Wherefore the plaintiff asks judgment for the delivery of the possession of said property and for said sum of Fifteen Hundred Dollars damages, together with the costs of suit.

JAMES COFFEY, *Plaintiff*,
By FLANSBURG & WILLIAMS,
His Attorneys.

STATE OF NEBRASKA, *Lancaster County, ss:*

C. C. Flansburg, on his oath says he is one of the attorneys for the plaintiff in the above entitled cause, that he has read the above and

foregoing petition, knows the contents thereof, and the same are true as he verily believes; and that the plaintiff is absent from the State of Nebraska.

C. C. FLANSBURG.

Subscribed in my presence and sworn to before me this 13th day of February, 1905.

[SEAL.]

R. O. WILLIAMS,
Notary Public,
Lancaster County, Nebraska.

Endorsed: Filed May 18, 1905. Geo. H. Thummel, Clerk.

5 Thereupon afterwards, to-wit:—On the 1st day of June, 1905, Answer was filed in said case, which said Answer is in words and figures following, to-wit:—

In the Circuit Court of the United States in and for the District of Nebraska.

JAMES COFFEY, Plaintiff,
vs.
COUNTY OF HARLAN, IN THE STATE OF NEBRASKA, Defendant.

Answer.

The defendant answering the plaintiff's petition,

First. Admits it is in possession of the property described in plaintiff's petition. Admits the defendant is one of the duly organized and existing counties in the State of Nebraska, and a citizen of the State of Nebraska. The defendant keeps the plaintiff out of the possession of the land in his petition described. The plaintiff and defendant claim the source of title to said premises was in one Ezra S. Whitney. The said Ezra S. Whitney and wife, on the 29th day of November, 1898, executed the instrument claimed by the plaintiff in his petition to be a deed and the same was filed for record in the office of the Register of Deeds on the 30th day of November 1898. The defendant among other claims to title and ownership in and to said premises claims the legal title and ownership to said premises by virtue of the sheriff's deed mentioned in plaintiff's petition.

Second. The defendant denies each and every allegation in plaintiff's petition contained not herein before specifically admitted.

6 Third. The cause of action in plaintiff's petition set forth did not accrue within ten years before this action began.

Fourth. The defendant, its predecessors and grantors have for more than ten years next before and preceding the bringing of this action, openly, notoriously and continuously held and kept said premises in possession adversely to any right of plaintiff and all other persons.

Fifth. The court ought not to have or take further cognizance of this action because the plaintiff herein claims title and ownership

solely through and under a pretended deed of conveyance of the premises described in this petition, purporting to have been made and entered into on the 23 day of June, 1902, and filed for record May 27, 1905, by and between one John Everson and wife of the County of Harlan, State of Nebraska, party of the first part and James Coffey, the plaintiff herein, of the County of Phillips, State of Kansas, party of the second part. Which said pretended deed of conveyance purported to convey from the said John Everson and wife unto the said James Coffey, his heirs and assigns forever, the said tract of land the plaintiff seeks to recover in this action. The said pretended deed of conveyance was not a *bona fide* deed of conveyance of said land but was colorable only and without consideration and was made and entered into for the sole purpose of giving jurisdiction to the courts of the United States, as the plaintiff then and there well knew, but the said John Everson is the real plaintiff in interest, and this action was commenced and is prosecuted for his sole use and benefit. The said John Everson and this defendant were before and at the time of the commencement of this action and still are both citizens of the State of Nebraska, and the plaintiff's cause of action, if he has any, is cognizable in the District Court of Harlan County in the said State of Nebraska, and not here in this court.

7

Sixth. The plaintiff claims title to the premises mentioned in his petition through and by reason of being the direct grantee of the said John Everson and by and through no other source, title or means whatever. Long before the commencement of this action and long before the plaintiff claimed any title or interest in said premises whatever, to-wit: on the eighteenth day of September, 1901, the said John Everson, for the sole purpose of trying the title to said premises, trespassed thereon for the purpose of inducing the defendant to cause him to be arrested in a criminal prosecution and in such criminal prosecution the title to said premises might be tried and determined. Thereafter to-wit: on the twenty-seventh day of September, 1901 in pursuance of the said purpose of the said John Everson, this defendant caused a complaint to be filed with the County Judge of said Harlan county, which complaint is and was in words and figures as follows:

In the County Court of Harlan County, Nebraska.

STATE OF NEBRASKA, Plaintiff,
vs.
JOHN EVERSON, Defendant.

Complaint for Cutting Down and Destroying Trees.

STATE OF NEBRASKA, *Harlan County, ss:*

The complaint and information of A. D. McCullough of the county aforesaid made in the name of the State of Nebraska before me the undersigned, a County Judge within and for said County this 27th day of September A. D. 1901, who being first duly sworn on his

oath says that John Everson on the 18th day of September, 1901, in the County aforesaid then and there being, did then and there unlawfully willfully and maliciously and without awful authority destroyed and cut down certain trees to-wit: Thirty-ive forest trees of the value of twenty-five dollars ($25.00) then and here standing and growing in a grove on lands owned by Harlan County, Nebraska, a municipal corporation. The said trees being he property of the said Harlan County contrary to the form of the tatute in such cases made and provided and against the peace and lignity of the people of the State of Nebraska.

D. A. McCULLOUGH,
Chairman Board of Supervisors,
Harlan County, Nebraska.

Subscribed in my presence and sworn to before me this 27th day of September, 1901.

C. M. MILLER,
County Judge.

[SEAL.]

Thereafter to-wit: on the 28th day of September, 1901, the said John Everson was duly arraigned and plead "Not Guilty" to said complaint, in said action then duly pending before said County Judge wherein the State of Nebraska was plaintiff and the said John Everson was defendant and afterwards to-wit: on said 28th day of September, 1901 the said John Everson was put upon trial for said offense set forth in said complaint, and upon trial duly had before said County Judge in said action the said John Everson was duly found guilty as in said complaint alleged and was duly sentenced to pay a fine of One Hundred Dollars and costs of suit. Thereafter to-wit:—on the 28th day of September 1901 the said John Everson appealed from said sentence and fine to the District Court of said Harlan County and said cause being duly and regularly appealed and transferred to the said District Court of said Harlan
9 County and docketed therein and at the October term thereof, the said John Everson being present in court, a jury was regularly empaneled and sworn to try said issue joined on said complaint of the State of Nebraska against said John Everson and trial was then and there, in the District Court of said Harlan County on the first day of October 1901 duly had, and thereafter on the said first day of October 1901, the jury having heard all the testimony, the instruction of the court and the arguments of the attorneys, retired to deliberate on the verdict and after having deliberated on their verdict on the said first day of October, 1901, returned into court with a verdict of "Guilty." Said verdict was received by the court and duly filed and entered of record and said John Everson was duly adjudged and sentenced to pay the State of Nebraska a fine of One Dollar and costs of prosecution, and to stand committed until said fine and costs were paid. Thereafter to-wit: on the 24th day of February, 1902, said John Everson removed said prosecution to the Supreme Court of the State of Nebraska by petition in error and caused the same to be duly docketed in the Supreme Court under the title of

John Everson, plaintiff in error, against the State of Nebraska, defendant in error, and on the Thirteenth day of January, 1903, the said judgment, sentence and fine of the District Court of the said Harlan County, was in the Supreme Court of the State of Nebraska, in all matters affirmed and said judgment, sentence and fine of said District Court is now in full force and effect and in no manner modified or reversed.

The trees mentioned in the complaint in said criminal prosecution were trees that had been growing upon the land in plaintiff's petition mentioned and were cut down and taken therefrom by
10 the said John Everson, he claiming at the time to have a legal estate in and to be the owner of said lands. At all times during the trial of said criminal cause the said John Everson claimed to be the owner of and to have a legal estate in and to be entitled to the immediate possession of said lands and justified the cutting down of said trees and the destroying of the same as owner of and having a legal estate in and right to the immediate possession of said land, and on no other grounds whatever. The same identical question as to whether or not the said John Everson had a legal estate in and was the owner of said land, or the defendant herein had a legal estate, in and was the owner of said land, was the only question in dispute, or to be determined in the trial of said criminal action. It being then and there admitted by both plaintiff and defendant on trial of said criminal case before said County Judge and in said District Court, that if the said John Everson, the immediate grantor to the plaintiff herein had a legal estate in or was the owner of said land, then in that event the said John Everson was not guilty as in said complaint charged, but if the said County of Harlan had a legal estate in or was the owner of the land in plaintiff's petition mentioned, then the said John Everson was guilty as in said complaint charged. All the facts, circumstances and testimony to sustain the title and right of the said John Everson to said land was testified to and introduced in evidence in said criminal prosecution to sustain the title and right of said John Everson to said land, that the plaintiff would introduce to sustain his title and right to said land and all the facts, circumstances and testimony to sustain the defendant's right and title to said land that the defendant would introduce to sustain its right and title to said land in this action.
11 The verdict, fine and sentence in said criminal prosecution was and is an adjudication that the claimed title and right of the said John Everson in said land was and is void and of no effect, and the plaintiff claiming only as grantee of the said John Everson and having no further or better title and right to said lands as between the plaintiff herein and the defendant herein, has been and is in said criminal prosecution adjudicated adversely to the plaintiff.

Seventh. On the 18th day of July, 1895, the said Ezra S. Whitney and wife conveyed the premises in plaintiff's petition mentioned to this defendant by a trust deed to one Sam L. Roberts as Trustee for this defendant. Said last mentioned deed being duly filed for record in the office of the County Clerk of said Harlan County on the 21st day of November 1895, and duly recorded in Book 1 Page 217 of

Record of Deeds. And by reason of said trust deed executed and delivered to said Sam L. Roberts as Trustee for this defendant, Defendant now is and for a long time prior to the commencement of this action was the owner of the premises in plaintiff's petition mentioned, by title derived through said trust deed.

Wherefore and by reason of the foregoing the plaintiff is barred and estopped from prosecuting his claimed cause of action against this defendant. The defendant, therefore prays that it may go hence without day and recover its costs in this case expended.

THE COUNTY OF HARLAN,
By W. A. MYERS, *Its Att'y.*

STATE OF NEBRASKA, *Harlan County, ss:*

W. A. Myers, being first duly sworn, deposes and says that he is County Attorney for Harlan County, and one of the at-
12 torneys for the defendant in this action; that the defendant is a corporation; Affiant further says that he believes the facts, allegations and statements contained in the foregoing answer to be true.

W. A. MYERS.

Subscribed in my presence and sworn to before me this 29th day of May, 1905.

W. G. BLACK,
Notary Public.

[SEAL.]

My commission expires Oct. 10, 1909.

Endorsed:—Filed Jun- 1, 1905, Geo. H. Thummel, Clerk.

13 Thereupon afterwards, to-wit: On the 17th day of October, 1905, Reply was filed in said case, which said Reply is in words and figures following, to-wit:

U. S. Circuit Court, District of Nebraska.

JAMES COFFEY, Pl'ff,
vs.
HARLAN COUNTY, Def't.

Reply.

Pl'ff admits the filing of the complaint by D. A. McCulloch and the proceedings thereunder as set out in defendant's answer and denies each and every other allegation therein.

JAMES COFFEY, *Pl'ff,*
By FLANSBURG & WILLIAMS,
His Att'ys.

Endorsed: Filed Oct. 17, 1905 Geo. H. Thummel, Clerk.

14 Thereupon afterwards, to-wit: On the 31st day of October, 1905, Memorandum Opinion was filed in said case, which said Memorandum Opinion is in words and figures following, to-wit:

In the Circuit Court of the United States for the District of Nebraska.

No. 90, "W."

JAMES COFFEY, Plaintiff,
vs.
THE COUNTY OF HARLAN, Defendant.

Memorandum Opinion.

MUNGER, *D. J.:*

This is an action of ejectment. The facts so far as necessary to a proper consideration of the question which I think need only be considered for a proper disposition of the case are as follows:

Both parties claim title through one Ezra S. Whitney. It is conceded that Whitney at one time was the owner of the real estate in question; that he was elected to the office of Treasurer of Harlan County. Subsequently criminal proceedings were instituted against him upon the charge of embezzlement. He was subsequently tried, found guilty and the amount of the sum embezzled found by the jury to be $11,190.00, and sentenced by the District Court to imprisonment for a term of two years and to pay a fine of $22,380.00 and costs. From this judgment of imprisonment and fine said Whitney duly appealed to the Supreme Court, which Court affirmed said judgment. Afterwards an execution was issued on said judgment to collect said sum of $22,380.00, and the Sheriff by virtue of said execution levied upon the real estate in ques-
15 tion and the same was sold to the defendant, Harlan County, and said sale, on the 28th day of November, 1898, was by the court duly confirmed. The Sheriff's deed, however, was not issued until the 13th day of Febrary, 1899. Said Ezra S. Whitney, on the 29th day of November, 1898, conveyed by quit claim deed, the premises in question to John Everson and William O. Woolman, who were his attorneys. Plaintiff has obtained title through them.

The question considered is as to the validity of the sale under the execution to convey the title to Harlan County.

It is claimed on the part of plaintiff that it is void for the reason that the judgment of the District Court imposing, as expressed in the judgment, a fine of $22,380.00 is void under the Fourteenth Amendment of the Constitution of the United States. It is conceded on the part of plaintiff's counsel that if said sum was a fine in the strict meaning of the term, that it was properly rendered and an execution might issue thereon. But it is urged that inasmuch as the Supreme Court of the State in the case of Everson *vs.* The State, 66 Neb., 154, decided that the same was not a fine, but a judgment, that it is void as having been rendered and the property taken under the execution without due process of law, in violation of said Fourteenth Amendment.

As I gather it from a consideration of that case, it was urged before the Court that as Section 124 of the Criminal Code provided that such fine should be enforced by execution or other process for the use only of the party or parties whose money, funds, property, securities or assets had been so embezzled, it was in conflict with Section 5, Article 8 of the Constitution of the State subsequently adopted, and hence, necessarily void.

16 The Supreme Court, however, held otherwise, and in the opinion say:

"Conceding that the judgment was a fine in the most accurate definition of that term, we can not see how it avails the plaintiff in error. The land was undoubtedly sold upon execution issued upon that judgment. If the proceeds of the judgment belong to the School Fund, then Harlan County is indebted to the School Fund for the amount paid at the sale, but it still has legal title to the land which was conveyed to it by the Sheriff. We are not, however, prepared to hold that this judgment belonged to the School Fund or that the proceeds of the judgment should be paid into that fund."

Then, after quoting from the provisions of Section 124, the Court further say:

"It will be seen by reading this statute that the fine is to operate as a judgment at law for the use of the party whose money has been embezzled, and this Court has said in a case involving the same principle that Section 5 of Article 8 of the Constitution was not intended to deprive the legislature of the power to pass statutes of this character, whereby a fixed sum in the nature of liquidated damages is given to one who has suffered injury by the wrongful act or oppression of a public officer."

The decision of the Supreme Court upholding the validity of this statute, so far as it is affected by the Constitution of the State, is binding upon this Court. Whether or not the judgment violates the Fourteenth Amendment of the Constitution of the United States is a question open for determination by the Federal Court.

It is urged on the part of plaintiff that in a criminal prosecution conducted in the name of the State against Ezra S. Whitney, a judgment rendered for the benefit of Harlan County, a third party, is one rendered without due process of law. I do not think so. The legislature undoubtedly had a right to prescribe the penalty which should be imposed upon a public officer for the crime of embezzlement, and the statute provided that such penalty should be imprisonment and a fine for the benefit of the injured party in double the sum embezzled. The issue then presented at the trial in

17 the criminal case was: first, was the defendant guilty of the crime of embezzlement; and, second, what was the amount embezzled. Of this the defendant had due notice, had an opportunity to be heard upon both propositions. The jury in due course said he was guilty of the embezzlement, and fixed the amount thereof. The law then said what the punishment should be, and whether it be denominated a fine for the benefit of the School Fund or a judgment for the benefit of the party whose property had been

embezzled, it seems to me, can make no difference in determining whether or not there was due process of law.

But, it is said, that subsequent to the institution of the criminal proceeding, and before the trial, the defendant might have made restitution, and while that would not bar the criminal prosecution, it would restore to the third party what he had lost, and, consequently, such party would have sustained no injury; and yet the crime of embezzlement would be complete before the restoration, and the jury, under the statute, would fix the amount embezzled without reference to whether a portion or the whole had been restored, and to give the party a judgment which could be enforced out of the defendant's property, without reference to the fact that restitution had been made, is not due process of law.

The answer to this is that it is within the power of the State to say what the punishment for embezzlement by a public officer shall be. The legislature has prescribed that in addition to imprisonment, a fine shall be imposed for the benefit of the party whose property was embezzled. The Supreme Court of the State have said this violates no provision of the Constitution of the State, nothwithstanding the term fine, as mentioned in the Statute, is in legal
18 effect a judgment in favor of the injured party. Such judgment however is a part of the penalty imposed by the State, and the mere fact that it is for the benefit of a third party does not, in my judgment, violate the provision of the Fourteenth Amendment, which provides that no State shall deprive any person of life, liberty or property without due process of law.

Defendant is entitled to a judgment.

Endorsed: Filed Oct. 31, 1905. Geo. H. Thummel, Clerk.

19 Thereupon afterwards, to-wit: At the November 1905,

Term of said Court, and on the 29th day of November, 1905, the following Special Findings and Judgment was signed and filed in said case and duly entered of record in Journal No. "4" of said Court, to-wit:

90, "W."

JAMES COFFEY, Plaintiff,
vs.
THE COUNTY OF HARLAN, NEBRASKA, Defendant.

This day this cause came on to be heard upon the pleadings and the evidence and was submitted to the court whereupon the court finds that one Ezra S. Whitney was the duly elected, qualified and acting treasurer of Harlan County, Nebraska, from January 5, 1894 to January 9th, 1896; and that at and prior to the time of his election to and incumbency in said office he was the owner in fee of the East half (E. ½) of the Southeast quarter (S. E. ¼) of section one (1) and lots two and three (2-3) of section twelve (12) all in township one (1) North of Range seventeen (17) West, Harlan County, Nebraska.

2. That on December 15th, 1896 a criminal information in due form was filed in the district court of Harlan County, Nebraska, as follows:

"THE STATE OF NEBRASKA
vs.
EZRA S. WHITNEY.

Information.

Be it remembered that Gomer Thomas, County Attorney in and for Harlan County, and in the 10th Judicial District of the
20 State of Nebraska, who prosecutes in the name and by the authority of the State of Nebraska, comes here in person into court at this December term A. D. 1896 thereof, and for the state of Nebraska gives the court to understand and be informed that Ezra S. Whitney was the County Treasurer of Harlan County, Nebraska from the 5th day of January, 1894, to the 9th day of January, 1896, and as such officer was charged with the collection, receipt, safe keeping, transfer and disbursement of the public money of Harlan County, Nebraska; that the said Ezra S. Whitney on the 8th day of January, 1896 in said county and state then and there being, and then and there as such officer being charged with the collection, receipt, safe keeping, transfer and disbursement of the public money of Harlan County, did then and there unlawfully, and feloniously convert to his own use and embezzle a large sum of said money to-wit: Eleven thousand one hundred and ninety dollars, belonging to Harlan County which said money had then and there come into the possession and custody of the said Ezra S. Whitney by virtue of said office and the discharge of the duties thereof.

GOMER THOMAS,
County Attorney."

3. That on the 13th day of May, 1897, upon a trial had upon said criminal information the jury returned a verdict as follows:

"We, the jury duly impanelled and sworn in the above entitled cause do find the defendant guilty, as charged in the information, and we further find the sum so embezzled to be $11,190.00."

4. That the court passed a sentence on the said Ezra S. Whitney in words and figures following:

21 "It is therefore considered and adjudged by the Court that Ezra S. Whitney, the defendant, be imprisoned in the penitentiary of the State of Nebraska, and be kept at hard labor, Sundays and Holidays excepted, for the period of two years and six months, and that he also pay a fine in the sum of $22,380, and that he pay the costs of this case, taxed at $205.08; solitary confinement is not a part of this sentence. The defendant given forty day to prepare and serve bill of exceptions. Defendant excepts.

JOHN R. THOMPSON, *Judge.*"

5. That said cause was appealed to the supreme court of Nebraska, by said Whitney and said conviction was affirmed, the record of said affirmance appearing in Volume 53, page 267 of the Nebraska Reports.

6. That on April 12, 1898, an execution issued on said criminal judgment which was duly levied on the above described land and the same was sold to Harlan County, which sale was confirmed on the 28th of November, 1898, and a sheriff's deed issued to said Harlan County on the 13th day of February, 1899.

7. That on the 29th day of November, 1899, the said Ezra S. Whitney transferred the said premises above described by quit claim deed to William O. Woolman and John Everson, his attorneys; that said William O. Woolman and wife quit-claimed said premises to John Everson and John Everson conveyed the said premises to the plaintiff herein.

8. That on September 18, 1901, the said John Everson went upon said land and cut 35 forest trees; that he was arrested on a criminal complaint in writing charging him with wilfully and maliciously cutting down the said trees, the property of Harlan County;
22 that he was tried, convicted and a fine imposed in the County Court, from which the said Everson took an appeal to the District Court; that he was found guilty therein and a fine imposed upon him; and that he appealed said cause from the District Court to the Supreme Court, wherein said conviction and fine against said Everson were affirmed, a report of which is found in Volume 66 of the Nebraska Reports, page 154. And that the said transfer of the said premises by said Everson to said Coffey was made subsequent to said final decision in the Supreme Court.

9. That on September 15, 1896, a civil action was brought in the District Court of Harlan County, Nebraska, in which the County of Harlan was plaintiff and Ezra S. Whitney and the sureties on his official bond as County Treasurer were defendants, which sought to recover the amount of money due from said Ezra S. Whitney as County Treasurer, and said action was on the 6th day of May, 1899, dismissed by said County of Harlan without prejudice.

10. That the sheriff's deed and the sale and proceedings upon which it is based are regular, valid and legal and that the title to said premises was divested thereby by due process of law and transferred to the defendant Harlan County, and that plaintiff has no title to the said premises and is not entitled to recover.

To all of which findings the plaintiff duly severally excepts. It is therefore

Ordered, Considered and Adjudged that the plaintiff take nothing by his writ; that said cause be dismissed; that the defendant go hence without day and recover of the plaintiff his costs herein expended, taxed at $—. It is further Ordered that a supersedeas bond in this case be fixed at $300.00.

W. H. MUNGER, *Judge.*

Endorsed: Filed Nov. 29, 1905. Geo. H. Thummel, clerk.

23 Thereupon afterwards, to-wit: On the 4th day of December, 1905, Assignment of Errors was filed in said case, which said Assignment of Errors is in words and figures following, to-wit:

In the Circuit Court of the United States Within and for the District of Nebraska. At Law.

JAMES COFFEY, Plaintiff,
vs.
THE COUNTY OF HARLAN, NEBRASKA, Defendant.

Assignment of Errors.

The plaintiff in this action in connection with his petition for a writ of error makes the following assignment of errors in the above entitled cause, to wit:

First: Upon the facts as found by the court the plaintiff was entitled to a judgment; and the court erred in rendering a judgment for the defendant.

Second: The court found that the judgment for damages rendered in favor of Harlan County and against Ezra S. Whitney in the criminal prosecution brought by the State of Nebraska against said Whitney for embezzlement did not deprive said Whitney of any opportunity to defend against his civil liability but constituted due process of law; and a sale of the property in controversy, under an execution issued upon said judgment so rendered, was valid, binding and divested the title according to the laws of the land. In this the court erred.

Third: The court erred in holding that the legal proceedings by which the defendant obtained title to the land in controversy constituted due process of law.

FLANSBURG & WILLIAMS,
Att'ys for James Coffey, Pl't'f.

Endorsed: Filed Dec. 4, 1905. Geo. H. Thummel, Clerk.

24 Thereupon, to-wit: On the 4th day of December, 1905, Petition for Writ of Error was filed in said case, which said Petition is in words and figures following, to-wit:—

In the Circuit Court of the United States Within and for the District of Nebraska. At Law.

JAMES COFFEY, Plaintiff,
vs.
THE COUNTY OF HARLAN, NEBRASKA, *Defendant.*

Petition for Writ of Error.

And now comes James Coffey, plaintiff herein and says that on or about the 29th day of November, 1905, this court entered a judgment

herein in favor of the defendant and against the plaintiff in which judgment certain errors were committed to the prejudice of this plaintiff all of which will more fully and in detail appear from the assignment of errors which is filed with this petition and made a part of this application.

Wherefore this plaintiff prays that a writ of error may issue in this behalf to the Supreme Court of the United States for the correction of errors so complained of and that a transcript of the record, proceedings and papers in this cause duly authenticated may be sent to the said Supreme Court of the United States.

JAMES COFFEY, *Plaintiff*,
By FLANSBURG & WILLIAMS, *His Att'ys.*

Endorsed: Filed Dec. 4, 1905. Geo. H. Thummel, Clerk.

25 Thereupon, to-wit:—At the November 1905 Term of said Court and on the 4th day of December, 1905, the following Order Allowing Writ of Error was signed and filed in said case, and duly entered of record in Journal No. "4" of said Court, to-wit:

JAMES COFFEY, Plaintiff,
vs.
COUNTY OF HARLAN, IN THE STATE OF NEBRASKA, Defendant.

Order Allowing Writ of Error.

At a regular and stated term, to-wit—the November 1905 Term of the Circuit Court of the United States of America, of the 8th Judicial Circuit and in and for the District of Nebraska, held at the Court Room in the City of Omaha, Nebraska, on the 4th day of December, 1905, present, The Honorable William H. Munger, District Judge presiding, upon motion of C. C. Flansburg, Attorney for the Plaintiff in the above entitled cause, and upon filing a petition for a writ of error together with an assignment of errors therein, it is

Ordered that a writ of error be and the same is hereby allowed to have removed to the United States Supreme Court, the judgment heretofore entered in this cause, and the amount of the bond is hereby fixed at Three Hundred Dollars ($300.00).

W. H. MUNGER, *Judge.*

Endorsed: Filed Dec. 4, 1905. Geo. H. Thummel, Clerk.

26 Thereupon afterwards, to-wit:—On the 4th day of December 1905, a Writ of Error was allowed in said case, and a Citation duly signed and returned and filed on the 27th day of December, 1905 with proof of service endorsed thereon, the following of which are the originals:

27 The Supreme Court of the United States.

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable Judge of the Circuit Court of the United States for the District of Nebraska, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said circuit court, before you or some of you between James Coffey, plaintiff and the County of Harlan, defendant wherein was drawn in question the construction of a clause of the constitution and a manifest error hath happened to the great damage of the said James Coffey, plaintiff, as by his complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same to the supreme court of the United States together with this writ so that you have the same at Washington on the 3rd day of January, 1906, in the said supreme court, to be then and there held, that the record and proceedings aforesaid being inspected, the said supreme court may cause further to be done therein, to correct that error, what of right and according to the laws and customs of the United States should be done.

W. H. MUNGER,
U. S. District Judge for Nebraska.

Witness the honorable Melville W. Fuller, Chief Justice of the said Supreme Court the 4th day of December, in the year of our Lord 1905, and in the 130th year of the independence of the United States of America.

[Seal United States Circuit Court, District of Nebraska.]

GEO. H. THUMMEL,
Attest Clerk U. S. Circuit Court, District of Nebraska.

[Endorsed:] 90 W. United States Circuit Court, District of Nebraska. James Coffey *vs.* County of Harlan, Nebraska. Writ of error. Filed Dec. 4, 1905, A. D. Geo. H. Thummel, Clerk.

28 W. A. Myers, Attorney.

County Attorney, Harlan County, Nebraska.

ALMA, NEBRASKA, *Dec.* 13, '05.

Mr. C. C. Flansburg, Lincoln Nebr.

MY DEAR SIR: Today Mr. Everson handed me the enclosed citation, to accept service, which is dated for Jan. 3rd. As it is so late and I am not familiar with rules and procedure yet of U. S. Court, I

do not think it treating you wrong to not accept service at this time. I want to be fair with you but I do not want to in any way jeopardize the county's interest. Therefore I return citation unsigned.

Yours truly,

W. A. MYERS.

[Endorsed:] 90 W. Coffey *v.* County of Harlan. Citation. Filed Dec. 27, 1905, A. D. Geo. H. Thummel, Clerk. Schurbacker & Reilly. Fed. Cas. No. 12501. (2 Dill. 127.) Book 21.

29 STATE OF NEBRASKA, *County of Harlan:*

A. P. Shelburn on his oath deposes and says that he is the sheriff of said county of Harlan, and has no interest either directly or indirectly in the case of James Coffey *v.* Harlan county; that on the 23 day of December, 1905, in said county and state he served a true copy of the attached citation on the said defendant Harlan county, by delivering a true copy thereof to W. A. Myers, Esq., the county attorney of said county.

A. P. SHELBURN.

Signed in my presence and sworn to before me this 23 day of December, 1905.

[Seal County Court, Harlan County, Nebraska.]

C. M. MILLER,
County Judge.

30 The Supreme Court of the United States.

IN THE UNITED STATES OF AMERICA, *ss:*

To the County of Harlan Greeting:

You are hereby cited and admonished to be and appear at a session of the supreme court of the United States to be holden at the city of Washington, District of Columbia, on the 3rd day of January pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of Nebraska wherein James Coffey is plaintiff in error and you are defendant in error to show cause, if any there be why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Melville W. Fuller, Chief Justice of said Supreme court this 4th day of December, in the year of our Lord one thousand nine hundred five, and of the Independence of the United States of America the one hundred thirtieth.

W. H. MUNGER,
U. S. District Judge.

I hereby acknowledge service of this citation this, 7th day of December, 1905.

THE COUNTY OF HARLAN,
By —— ——, *Its Attorney.*

[Endorsed:] 90 W.

31 Thereupon afterwards, to-wit: On the 8th day of December 1905, Bond was filed in said case, which said Bond is in words and figures following, to-wit:—

In the Circuit Court of the United States Within and for the District of Nebraska.

JAMES COFFEY, Plaintiff,
vs.
THE COUNTY OF HARLAN, NEBRASKA, Defendant.

Know all men by these presents: That we James Coffey as principal and John Everson as surety are held and firmly bound unto the defendant, the County of Harlan, in the sum of Three Hundred Dollars ($300.00) lawful money of the United States to be well and truly paid to the said defendant Harlan County, his certain attorneys executors, administrators or assigns; to which payment well and truly to be made we hereby bind ourselves, our heirs, executors, administrators jointly and severally by these presents.

Sealed with our seals and dated this 5th day of December, 1905.

Whereas, lately at a circuit court of the United States for the District of Nebraska in a suit depending in said court between James Coffey, plaintiff and the County of Harlan, defendant, a judgment was rendered against the said James Coffey, said James Coffey having obtained a writ of error (and filed a copy thereof in the clerk's office of the said court) to reverse the judgment in the aforesaid suit, and a citation directed to the said county of Harlan citing and admonishing it to be and appear at a session of the Supreme Court of the United States to be holden at the city of Washington

32 in *said circuit* on the 5th day of January next.

Now the condition of the above obligation is such that if the said James Coffey shall prosecute said writ of error to effect and answer all damages and costs if he fails to make the said plea good, then the above obligation to be void, else to remain in full force and virtue.

JAMES COFFEY,
By FLANSBURG & WILLIAMS.
JOHN EVERSON.

Sealed and delivered in the presence of
ALMA OLSON.

Approved by
W. H. MUNGER,
District Judge.

Endorsed: Filed Dec. 8, 1905. Geo. H. Thummel, Clerk.
3—177

33 Thereupon afterwards, to-wit: On the 8th day of December, 1905 Præcipe for transcript was filed in said case, which said Præcipe for transcript is in words and figures following, to-wit:

United States Circuit Court, District of Nebraska.

No. 90, Docket "W."

JAMES COFFEY, Plaintiff,
vs.
THE COUNTY OF HARLAN, IN THE STATE OF NEBRASKA, Defendant.

Præcipe for Transcript.

Please prepare Transcript for the Supreme Court of the United States in the above entitled cause, and include therein the following proceedings and papers, to-wit:

1. Amended Petition.
2. Answer of defendant.
3. Reply of Plaintiff.
4. Memorandum Opinion.
5. Special Findings, and judgment.
6. Assignment of errors.
7. Petition for Writ of Error, and Order allowing same.
8. Writ of Error.
9. Citation, and Bond.
10. Præcipe for Transcript.
11. Certificate of Clerk.

Dated this 8th day of December, 1905.

FLANSBURG & WILLIAMS,
Attorneys for Plaintiff.

Endorsed: Filed Dec. 8, 1905. Geo. H. Thummel, Clerk.

34 UNITED STATES OF AMERICA, *District of Nebraska, ss:*

Pursuant to the foregoing Writ of Error, and in obedience thereto, I, Geo. H. Thummel, Clerk of the Circuit Court of the United States for the District of Nebraska, hereby certify that in compliance with the Precipe, a copy of which is found on Page 33 hereof, the foregoing record has been made and that the same is a true and faithful transcript of the pleadings and proceedings of record and on file in said Court, as mentioned in said Precipe and as indicated in the foregoing index, in the case of James Coffey *vs.* County of Harlan, Nebraska, No. 90 Docket "W," and that copies of the Writ of Error and Citation, duly certified, have been lodged and remain in my said office as such Clerk.

Witness my hand and the seal of said Court at Omaha in said District this 27th day of December, 1905.

[Seal United States Circuit Court, District of Nebraska.]

GEO. H. THUMMEL, *Clerk.*

Endorsed on cover: File No. 20,034. Nebraska, C. C. U. S. Term No. 177. James Coffey, plaintiff in error, *vs.* The County of Harlan. Filed January 3d, 1906. File No. 20,034.